IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1288 of 2001

with

SPECIAL CIVIL APPLICATION No 1421 of 2001

with
SPECIAL CIVIL APPLICATION No.3137 of 2001

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE K.R.VYAS

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

AKHIL GUJARAT PRAVASI VAHAN SANCHALAK MAHAMANDAL
Versus
STATE OF GUJARAT

Appearance:
1. Special Civil Application No. 1288 of 2001
MR PRASHANT G DESAI for Petitioner No. 1-5
MR.SN SHELAT,AG for Respondent No. 1-5
2. Special Civil Application No. 1421 of 2001
MS.MITA S PANCHAL WITH MR SHAKTISINH GOHILfor Petr.
MR.SN SHELAT,AG for Respondent No. 1
3. Special Civil Application No.3137 of 2001
MS.MITA S.PANCHAL for petitioner.

MR.SN SHELAT,AG for Respdts.

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE K.R.VYAS

Date of decision: / /2001

CAV JUDGEMENT

(Per : MR.JUSTICE K.R.VYAS)

1. The petitioners in this group of petitions have challenged Rule 5, sub-rule (1) and (2) of the Bombay Motor Vehicles Tax Rules, 1959 (in short'the Rules') as amended by Notification dated 6.2.2001 and circular dated 8.2.2001 issued by the State Government and section 3A (1) and 3A(2) of Bombay Motor Vehicles Tax Act, 1958 (in short 'the Act').

The petitioners of Special Civil Application No. 1288 of 2001 who are luxury bus operators, in their amended petition, also prayed to declare section 3A(1) and 3A(2) of the Act as ultra vires the Constitution. They have also prayed to declare Act No.11 of 2000 and Ordinance No. 2 of 2000 as ultra vires, violative of Articles 14 and 19(1)(g) of the Constitution of India and violative of Entry 56 and 57 of List II of Seventh Schedule to the Constitution.

2. The petitioners of Special Civil Application No. 1288 of 2001 are the Associations of which all the members are tour operators doing their business in the State of Gujarat.

The petitioner of Special Civil Application No. 1421 of 2001 is the owner of omnibuses and is plying the said omnibuses all throughout the State of Gujarat and thereby earning his livelihood.

3. The petitioners of Special Civil application No. 3137 of 2001 are the owners of trucks and are doing business of lifting salt in their trucks loading the same from manufacturing site situated in the deserts of Kutch and unloading the same to nearer railway stations. The said business of the petitioners of lifting salt is available only from 1st March to 31st May every year and thereafter the said activity of lifting salt is not available because of the nature of work. According to the petitioners, they use their trucks only for three months and thereafter on account of non availability of work of lifting salt, the petitioners are keeping all the

trucks for non use for 6 to 9 months.

4. According to the petitioners, because of the notification dated 6.2.2001 issued by the State Government, even though they are not using the vehicles, they are required to pay advance tax. It is the grievance of the petitioners that the said notification has virtually wiped off the original statutory rules provided by the State Government under the provisions of Bombay Motor Vehicles Tax Act whereby the petitioners were not required to pay tax for non use of the vehicle. The petitioners have, therefore, contended that the notification dated 6.2.2001 and the circular dated 8.2.2001 issued by the respondents are in contravention of the Act and Rules and, therefore, they are required to be declared ultra vires Articles 14 and 19(1)(g) of the Constitution of India.

5. With a view to appreciate the grievance, it is necessary to give certain factual details.

The then Bombay State enacted Bombay Motor Vehicles Tax Act, 1958 which was adopted by the Gujarat State wherein there was power to levy tax on all the vehicles including Omni buses (Luxury Buses). The Bombay State had also enacted Bombay Motor Vehicles (Taxation of passengers) Act, 1958 which was adopted by the Gujarat State wherein there was power to levy taxes on passengers of state carriage whereas in the definition of 'state carriage', even the contract carriage is also included. Omni bus operators were making payment of passenger tax till 1982 under the provisions of Bombay Motor Vehicles (Taxation of Passengers) Act, 1958.

6. The State of Gujarat, by Gujarat Bill No. 14 of 1982 enacted the Bombay Motor Vehicles (Taxation of Passengers) (Gujarat Amendment) Act, 1982 wherein for luxury or tourist omni buses or ordinary omni buses, the rates are prescribed of additional tax on monthly, weekly or daily buses by amending section 2 of the said Act.

7. Section 3A was introduced by Gujarat Act No.9 of 1976 and thereafter by Gujarat Act No.20 of 1992 wherein Bombay Motor Vehicles Tax Act, 1958 was amended. The statement of object and reasons of the said amendment is very clear.It says that as it was considered necessary to augment the financial resources of the State to meet the huge expenditure on account of natural calamities like scarcity, flood and cyclone and as the Gujarat Legislative Assembly was not in session, the Bombay Motor Vehicles Tax (Gujarat Amendment) Ordinance, 1975 (

Gujarat Ordinance 8 of 1975) was promulgated to levy enhanced tax at the rate of 10%, on the amount of motor vehicles tax payable in respect of certain types of motor vehicles under the Bombay Motor Vehicles Tax Act, 1958. Section 3A originally reads as under:

"3A. Levy of enhanced tax --(1) On and from the 1st day of December 1975, there shall be levied and collected, on all motor vehicles specified in clauses (i) and (VI) of Class A in Part I of the First Schedule and on all motor vehicles of like description falling under Part II of the said Schedule which are used or kept for use in the State, a tax (hereinafter referred to as 'the enhanced tax'), in addition to the tax leviable under section 3, at the rate of ten percent, of the amount of tax levied under section.

(2) The enhanced tax leviable under subsection (i) shall be paid in advance by every registered owner or any person having possession or control of the motor vehicles---

(i) annually at the rate specified in subsection (1), or

(ii) for one or more quarters, at one-fourth of the rate so specified for each such quarter, or

(iii) for any period less than a quarter expiring on the last day of the quarter, at one-fourth of the rate so specified less one-twelfth of the said rate for every complete calendar month which has expired during such quarter.

Provided that---

(i) where any such owner or person has, before the commencement of the Bombay Motor Vehicles Tax (Gujarat Amendment) Ordinance, 1975 (Guj.Ord. 8 of 1975), paid the tax leviable under section 3 for the period of the year or for the period of one or more quarters expiring on the 31st day of March 1976, such owner or person may pay the enhanced tax for the month of December 1975 and for the quarter commencing on the 1st day of January 1976, within the period prescribed for the payment of tax leviable under section 3 for the year or the quarter commencing on the 1st day of April 1976.

(ii) where any such owner or person has not paid the tax leviable under section 3 for the said period before such commencement, he may pay the enhanced tax for the month of December 1975, within the period prescribed for the payment of tax leviable under section 3 for the quarter commencing on the 1st day of January 1976.

(3) Except as otherwise provided in subsection (1) and (2), the provisions of this Act and the rules made thereunder shall, so far as may be, apply in relation to the enhanced tax leviable under subsection (i), as they apply in relation to the tax leviable under section 3.

8. Thereafter Bombay Motor Vehicles (Tax) Act, 1958 was further amended by Act No.29 of 1982 wherein section 3A was substituted by new Section 3A whereby monthly, weekly and daily rates were prescribed under the said Act. Substituted section 3A reads as under:

"3A. Levy of additional tax--- (1) On and from the first day of April, 1982, there shall be levied and collected, on all omnibuses which are exclusively used or kept for use in the State as contract carriages, a tax in addition to the tax levied under section 3, at the rates fixed by the State Government, by notification in the Official Gazette, but not exceeding the maximum rates specified in the table below:

T A B L E

A. Ordinary omnibuses---
(i) Monthly rate of Rs. 240 per passenger permitted to be carried.
(ii) Weekly rate of Rs./.80 per passenger permitted to be carried.
(iii) Daily rate of Rs. 16/- per passenger permitted to be carried.

B. Luxury or tourist omnibuses---
(i) Monthly rate of Rs. 360 per passenger permitted to be carried.
(ii) Weekly rate of Rs.120/- per passenger permitted to be carried.
(iii) Daily rate of Rs. 24/- per passenger permitted to be carried.

(2) The additional tax levied under subsection (1) shall be paid in advance by every

registered owner or any person having possession or control of the omnibuses-

(i) monthly at the rate specified in the table in subsection (i), or

(ii) for any period less than a month, weekly or daily at the rates specified in the table in subsection (i).

(3) Except as otherwise provided in subsection (1) and (2), the provisions of this act and the rules made thereunder shall, so far as may be, apply in relation to the additional tax leviable under subsection (1) as they apply in relation to the tax leviable under section 3.

9. The said section 3A was amended by Gujarat Bill No. 29 of 1991 with effect from 1.4.1991 wherein instead of monthly, weekly and daily rates, annual rate of Rs. 1000/- per passenger permitted to be carried in ordinary designated omnibus and luxury or tourist designated omni buses were prescribed.

10. The Luxury omnibuses and omnibuses were not defined anywhere except in Explanation of section 3A. After 1991, time and again, the rates in respect of composite tax were changed. However, in the year 1991, instead of additional tax, passenger tax was imposed which includes the vehicle tax as well as passenger tax.

11. The State of Gujarat has also enacted Bombay Motor Vehicles Rules, 1959. Rule 5 provides for certificate of nonuser. Subsection (5) of section 3A provides for nonuser. Subsection 5A allows refund of tax for a period of nonuser is more than three months and clause (b) of subsection (5) provides for refund of tax for more than three months which can be claimed only if the owner or the person in possession of the vehicle proves to the satisfaction of the authorised officer that the vehicle was not used for reasons beyond his control. It appears that one of the petitioners challenged the provision of clause (b) of subsection 5 of section 3A on theground that if the vehicle is not used on the road, no tax can be levied as per Entry 56 and 57 of List II of Seventh Schedule to the Constitution as per the decision of the apex Court by filing Special Civil Application No. 10356 of 1996. This Court by decision dated 23.4.1998, allowed the petition and the words "for reasons beyond the control of such owner or the person" occurring in clause (b) of subsection (5) of section 3 are struck down as being beyond the competence of legislation (See Kaushikbhai Patel Vs. State, 1998 (2) GLR 1093). The

State Government filed Special Leave Petition before the Supreme Court of India which was admitted and stay was granted. During that period, by Act No.11 of 2000, the Bombay Motor Vehicles Tax Act is amended and more particularly clause (b) of the subsection (5) of section 3A was also amended and instead of three months, one month is substituted. It is also provided that designated omnibuses in respect of which tax has been paid has not been used or used for a period of one month on account of accident which is registered before the police or in a competent court or the Government authority. The said Act NO.11 is also challenged in the present petition.

12. The Supreme Court of India dismissed the appeal filed by the State of Gujarat by judgment and order dated 9.5.2000 (See State of Gujarat Vs. Kaushik Patel, AIR 2000 SC 1217). As nonuse applications were not considered as per the decision of the Supreme Court, one of the petitioners filed Special Civil Application before this Court. This Court (Coram: M.S.Shah,J.), on 11.9.2000, directed the State Government to consider the NT Forms submitted by the petitioner by deciding the question whether the vehicles in question were actually used on road or not during the relevant period without considering as to whether nonuser was for reasons beyond the control of the owners of the vehicles. Thereafter, by Ordinance No.3 of 2000, the State Government amended Bombay Motor Vehicles Tax Act. The said Ordinance is also under challenge in this petition.

13. In order to know the reasons for issuance of notification dated 6.2.2001 and circular dated 8.2.2001, it is necessary to refer to Rule 5 of Bombay Motor Vehicles Tax Rules 1959 which reads as under:

"Rule 5: Certificate for nonuser:

(1) A registered owner of, or any person who has possession or control of, a motor vehicle, not intending to use or keep for use such vehicle in the State and desiring to be exempted from payment of tax on that account shall, before the expiry of the current period for which the tax on such vehicle has been paid, or for which a declaration of nonuse as herein provided has been made, make a declaration in Form NT for any specified period not exceeding beyond the financial year in which it is made, to the appropriate Taxation Authority along with the Certificate of taxation.The declaration in Form 'NT' shall be accompanied by a fee of rupees ten

and shall be presented either in person to the appropriate Taxation Authority (and the Taxation Authority shall duly acknowledge its receipt) or send by registered post acknowledgment due.

Provided that where a vehicle is rendered incapable or being used or kept for use on account of an accident, mechanical defect or any other sufficient cause, which make it impossible to give an advance declaration as aforesaid, then such declaration shall be given within a period of seven days from the date of occurrence of such accident, mechanical defect or such other cause, either in person or by registered post AD.

(2) If the Taxation Authority is satisfied that the motor vehicle, in respect of which a declaration in Form 'NT' has been made, has not been used, or kept for use for the whole or part of the period mentioned in the declaration and for which tax has not been paid, it shall certify that the motor vehicle has not been or kept for use for the whole or part of such period as the case may be by making an endorsement in the certificate of taxation to that effect;

Provided that nothing contained in this sub-rule shall affect the right of the Taxation Authority to recover the tax and penalty due for the period of nonuse so certified if, at any time, it is found that the vehicle was actually used or kept for use in the State during such period.

2A(i): Where the nonuse of the designated omnibus as referred to in section 3A exceeds three months declaration in form 'NT' shall be made to the State Government in this behalf, through the appropriate Taxation Authority.

(ii) If the State Government or the authorised officer is satisfied that designated omnibus in respect of which a declaration in form 'NT' has been made has not been used or kept for use for the whole or the part of the period mentioned in the declaration and for which the tax has not been paid, it shall certify that such omnibus has not been used or kept for use for the whole or part of such period and endorsement to that effect shall be made in the certificate of taxation.

(3) The declaration in Form 'NT' given under the proviso to subrule (1) shall be accompanied by a fee of rupees ten and documentary evidence, if any, or any other proof evidencing such nonuse of the vehicle and the period thereof. Where the appropriate Taxation Authority, on considering

the evidence adduced, if any, and on making such inquiries as it deems fit refuses to admit the declaration of nonuse or to certify the period of nonuse, it shall record in writing its reason therefor and communicate to the applicant."

14. According to the affidavit of Joint Director of Transport, the respondent no.2 herein, the provisions relating to grant of exemption from payment of tax on account of nonuse of a motor vehicle as appearing in Rule 5 were not in conformity with provisions of Rules 13 and 16(A) of the Rules. Moreover, the cases had come to the notice of the Government indicating that many a times, motor vehicles which purported to have been put to nonuse were operated clandestinely resulting in evasion of tax and loss of revenue to the Government and the said pre-amended provisions also created contradiction with the provisions of subsection (5) of section 3A which provide for grant of refund on account of nonuse of designated omnibuses. With a view to remove this contradiction and to prevent evasion of tax by using vehicles declared in nonuse, Rule 5 has been amended by the impugned notification dated 6.2.2001. The petitioners, however, have challenged the said notification dated 6.2.2001 on the ground that the same is in colourable exercise of powers. According to the petitioners, having failed before this Court as well as before the Supreme Court, the State Government in colourable exercise of power, issued notification dated 6.2.2001.

15. The petitioners of Special Civil Application No. 1288 of 2001 have challenged the constitutional validity of sections 3A (1) and 3A(2) which are reproduced as under:

"3A.Levy and Payment of tax on certain Omnibuses.

(1) On and from the 1st day of April 1991, there shall be levied and collected on all omnibuses which are used or kept for use in the State exclusively as contract carriages (hereinafter in this section and subsection (1A) of section 4 referred to as the designated omnibuses) a tax at the rates specified in the table below:

Table

Description of Designated Omnibuses.	Annual rate of tax
1(a) Ordinary designated omnibuses permitted to be carried not	Rs.2700/- per passenger

	more than 20 passengers. permitted to be carried.	
(b)	Ordinary designated omnibuses permitted to be carried more than twenty passengers.	Rs.4050/- per passenger to be carried.
2.	Luxury or tourist designated Omnibuses permitted to be carried not more than 20 passengers.	Rs.4500/- per passenger permitted to be carried.
(b)	Luxury or tourist designated Omnibuses permitted to be carried more than 20 passengers. permitted to be carried.	Rs.6000/-per passenger

---

Provided that in the case of designated omnibuses used solely for the purpose of transporting students of educational institutions in the State in connection with any of the activities of such educational institutions, a tax shall be levied and collected under subsection (1) of section 3 and not under this subsection.

(2)(a) The tax leviable under subsection (1) shall be paid in advance by every registered owner or any person having possession or control of the designated omnibuses either annually at the annual rate specified in the Table appearing in subsection (1) or in monthly instalments of one twelfth of the annual rate.

(b) The annual payment of tax or the payment of monthly instalment of tax shall be made within such period and in such manner as may be prescribed."

12. The learned Counsel for the petitioners Mr. P.G.Desai challenged these provisions on the following grounds:

(i) The State Government has discriminatorily provided additional composite tax only to luxury buses having a contract carriage permit excluding state carriages within sweep of provision of section 3A. It was elaborated that in respect of stage carriages who are also engaged in a contract carriage are not required to pay tax as per section 3A and they are required to pay the tax on passenger basis, viz. on actual income basis. This is a clear discrimination so far as omnibuses are concerned.

(ii) There is no reasonable classification and

the classification also has no rational so as to achieve the object of the Act and therefore also this provision is bad.

(iii) As per the Supreme Court judgment, the tax can be levied only on those vehicles which are actually used on road. This is in consonance with Entry 56 and 57 of List II of Seventh Schedule to the Constitution and, therefore, any provision in respect of Bombay Advance Tax on monthly or yearly basis is bad in law which is not in consonance with the provisions of the Constitution and also not in consonance with the judgment of the Hon'ble Supreme Court.

(iv) Earlier from 1982 till 1991, the taxes are collected on daily, weekly and monthly basis. That procedure was discontinued only to disadvantage of the bus operators without any reasons and arbitrarily.

(v) Amendment to Rule : 5 by notification dated 6.2.2001 is also bad as bus operators were asked to compulsorily pay the tax even though they do not intend to use the vehicle on road. Even for deciding the refund application, no time is prescribed under the Rules or the Act. Therefore, the intention of the Government is only to collect money and not to refund the amount, thereby killing the luxury bus industry.

(vi) If the Government has no power to levy tax and if the person is not liable to pay tax at any time, the collection of tax from him with a possible contingency of refund at a later stage will not make the original levy valid.

(vii) Some of the members of the petitioner Association also filed NT forms for one day, 2 days, 3 days as the vehicles were not used during the month for a refund of the amount. Though the said NT forms were accepted, the State Government did not want to give refund in view of the provisions of the Act. Therefore, if the Act is to be read as read by the State Government, it is violative of Articles 14, 19 (1)(g) of the Constitution of India and Entry 56 and 57.

In order to make good these submissions, learned Counsel placed reliance on the decisions rendered in:

(1) AIR 1975 SC 17

Bolani Ores Limited Vs.State of Orissa.
(2) AIR 1980 SC 1547
Travancore Tea Co.Vs.State of Kerala
(3) 39(2) GLR 1092 (Kaushik K.Patel Vs.State)
(4) AIR 2000 SC 2175(State of Gujarat Vs.
Kaushik K.Patel)
(5) 20 STC 290 Bhawani Cotton Mills Vs.State of
Punjab and Haryana.
(6) AIR 1987 SC 1911
State of Karnataka Vs.K.Gopalkrishna Shenoy

13. Learned Counsel appearing for other petitioners, by adopting the submissions of Mr. Desai, submitted that unless the vehicle is used on road, no tax can be recovered. They submitted that in the hope of getting refund, no advance tax can be recovered as the parties have never decided the cases of refund to operators for years and have on the contrary, adjusted amounts of refund in future tax. It is submitted that claiming refund of tax amount is an illusory and in the event of getting the same, the authorities will pay the same without interest while the operators are required to pay not only interest, but penalty on failure to pay the advance tax. Learned Counsel further submitted that by notification dated 6.2.2001, Rule 8 of the Bombay Motor Vehicles Tax Rules, 1959 will have negative effect as under the statutory rules, i.e. under Rule 8(iii)(a) and 8(iii)(b), certain exemptions are given to the owners of transport vehicles. Under Rule 8(iii)(a), relaxation of 20 days is given to the owners of transport vehicle from payment of tax which the concerned person has to pay under Rule 8(iii).Under Rule 8(iii)(b), relaxation of ten days is given to the owner of transport vehicle, but under notification dated 6.2.2001, relaxation is taken away as far as the relaxation under Rule 8(iii)(b) is concerned as only ten days relaxation is given to the owner of the transport vehicle. Consequently, a person has to pay advance tax every month on the last day of the month which is commencing from the next month. It is, therefore, contended that the said action is arbitrary and discriminatory.

14. Learned Advocate General appearing for the State, on the other hand, after inviting our attention to the provisions of the Act and more particularly section 3A, submitted as under:

(1) The motor vehicles tax is levied and collected on all omnibuses which are used or kept for use in the State. It is competent for the State Legislature to levy vehicle tax if the

vehicles are kept for use within the State. He submitted that the prescribed rate of tax is on sitting capacity, it is on motor vehicle and not a composite tax.

It is submitted that the liability to pay tax is attracted on omnibuses getting registration within the State as it is kept for use by the owner. The Act provides for refund for nonuser of omnibuses by the owner for a period exceeding one month.

In order to make good his submissions, reliance is placed on the following authorities:

(i) AIR 1980 SC 1547 (Travancore Tea Co. Ltd. Versus State of Kerala.

(ii)AIR 1980 SC 148 (State of Mysore Vs. Sundaram Motors Pvt.Ltd.

(iii) AIR 1981 SC 774 (International Tourist Corpn. Vs. State of Haryana).

It was submitted that in these cases, the taxable event is keeping for use or alternatively user within the State. Once the motor vehicle is used within the State, the taxable event occurs and the tax is attracted.

Reliance is placed on the decisions in the case of Union of India Vs. Chowgule & Co.Ltd., AIR 1992 SC 1376, M/s Central Coalfields Ltd. Vs. State of Orissa, AIR 1992 SC 1371 and Chief General Manager, Jagannath ARea Vs. State of Orissa, 1996 (8) JT 530.

Finally, it was contended that it is competent for the State Legislature to impose advance tax in view of the decision in the case of State of Maharashtra Vs. Madhukumar Balkrishna Badiya, AIR 1988 SC 2062.

On the question of tax discrimination and violation of Article 14 of the Constitution of India, learned Advocate General invited our attention to the following decisions:

(i) AIR 1975 SC 583 (Krishnan Vs.State of Tamil Nadu)

(ii) AIR 1983 SC 634 (Malwa Bus Service Vs. State of Punjab)

(iii) AIR 1991 Karnataka 40 (Shri Gajanand Motor Transport Co. Vs. State of Karnataka)

(iv) AIR 1995 SC 885 (State of Bihar Vs. Sachidanand Sinha).

15. Perusing the notification dated 6.2.2001, it is clear that in exercise of powers conferred by clause (a) of subsection (2) of section 23 of the Bombay Motor Vehicles Tax Act, 1958 (Bombay LXV of 1958), the Government of Gujarat amended Motor Vehicles Tax Rules, 1959 by substituting subrule (1) of Rule 5 whereby a registered owner or any person who is in possession or control of a motor vehicle in respect of which tax is paid in advance not intending to use or keep for use such vehicle in the State and desiring to claim refund of tax on that count shall before commencement of the period, for which the refund of tax is to be claimed, may give advance declaration in Form 'NT' for any specified period not exceeding beyond the period for which the tax is paid in advance to the Taxation Authority in whose jurisdiction such vehicle is to be kept under nonuse along with certificate of taxation, permit as well as certificate of fitness in case of transport vehicles and a fee of rupees ten,provided that where a vehicle is rendered incapable or being used or kept for use on account of an accident mechanical defect or any other sufficient cause which make it impossible to give an advance declaration as aforesaid, then such declaration shall be given within a period of seven days from the date of occurrence of such accident, mechanical defect or such other cause either in person or by registered post acknowledgment due.

It is further provided that in Rule 8 in clause (ii), subclause (b) shall be deleted. Necessary circular to the above notification was issued on 8.2.2001. In the Circular, it is provided that where the nonuse of the designated omnibus as referred to in section 3A exceeds three months, declaration in form NT shall be made to the State Government or such officer as may be authorised by the State Government through the appropriate Taxation Authority. Further, if the State Government or the authorised officer is satisfied that designated omnibus in respect of which a declaration in form NT has been made has not been used or kept for use for the whole or the part of the period mentioned in the declaration and for which the tax has not been paid, it shall certify that such omnibus has not been used or kept for use for the whole or part of such period and endorsement to that effect shall be made in the certificate of taxation. It is also stated that the declaration in Form NT given under the proviso to subrule (i) shall be accompanied by

a fee of rupees ten and documentary evidence, if any, or any other proof evidencing such nonuse of the vehicle and the period thereof. Where appropriate Taxation Authority, on considering the evidence adduced, if any, and on making such inquiries as it deems fit, refuses to admit the declaration of nonuse or to certify the period of nonuse, it shall record in writing its reason therefor and communicate to the applicant. As far as Rule 8 is concerned, the period is provided within which declaration is to be made by incorporating the words "declaration shall be delivered---

(i) where a motor vehicle is brought for registration within three days of the application for registration;

(ii) where the use of the vehicle was discontinued and the discontinuance duly intimated, before the vehicle is again brought into use;

(iii) where the tax under section 3 has been paid, within twenty days from the date of expiry of the period for which the tax has last been paid or within such extended period as may be fixed by the State Government in these rules by notification in the Official Gazette.

(iv) in other cases, within 7 days of the date from which the vehicle liable to be taxed or demand by the Taxation Authority whichever is earlier.

16. The effect of the aforesaid provisions will be that the operator will have to make a declaration that he is not to make use of the vehicle unless he pays the advance tax. Tax is to be paid in advance though section enables the authority to levy tax which was not insisted upon till the notification dated 6.2.2001. Under section 4, tax is attracted moment vehicle is registered and the operator has to prove that the vehicle is not used and before that, he has to pay and thereafter to claim refund. Combined reading of section 3A of the Bombay Motor Vehicles Tax Act, 1958 and amended Rule 5 make it clear that the owner or any person who is in possession or control of a motor vehicle will have to pay advance tax of the vehicle used or kept for use at the rate specified in table of section 3A annually per passenger permitted to be carried. The only exception provided in section 3A is with respect to designated omnibuses used solely for the purpose of transporting students of educational institutions in the State and in connection with any of the activities of such educational institutions, tax shall be levied and collected under subsection (1) of section 3 and not under section 3A of the Act. Subsection 2(a) of section 3A provides that the tax leviable shall be paid in advance by every registered

owner having possession or control of the designated omnibus either annually at the annual rate specified in table appearing in subsection (1) or in monthly instalments of 1/12th of the annual rate.

17. Learned counsel for the petitioners, by inviting our attention to rate of tax stated in table in section 3A which provides for annual rate of Rs. 1500/- per passenger permitted to be carried, submitted that the tax being composite in nature, namely passenger as well as motor vehicle is beyond the scope of the Act.

18. It is also the contention of the learned Counsel for the petitioners that section 3A is violative of Entry 56 as well as Entry 57 as they are in respect of tax which is in compensatory nature. Thus, if a bus is not used on road or if passengers are not travelled, no tax can be levied. In the submission of the learned Counsel, advance tax can be taken provided the vehicle is used. Asking the operators to pay advance tax is wrong reading the language of the said section.

19. Learned Advocate General, while refuting the claim of the petitioners that the tax being composite in nature, maintains that it is the tax on passengers. In our opinion, learned Advocate General is not right in his submission. Mr. K.M. Makwana, Joint Director of Transport, in para 6 of his affidavit, has stated in no uncertain terms as under:

> "6. I say and submit that section 3A was substituted by Gujarat Act No.10 of 1991. Under this section 3A, composite tax is levied on designated omnibuses. This tax can be paid either annually at the annual rate or in monthly instalments of one twelfth of the annual rate."

In the statement of Objects and Reasons of Bombay Motor Vehicles (Taxation of Passengers) (Gujarat Amendment) Act, 1982, it is stated that the existing definition of "Operator" in clause (4) of section 2 is restricted to mean only a person whose name is entered in the permit as the holder thereof. It is, therefore, not feasible to collect the passenger tax where the State carriage is used or allowed to be used without a permit. Hence, it is considered necessary to extend the scope of aforesaid definition to include a person in whose name that vehicle is registered under the Bombay Motor Vehicles Act or any person having possession or control of such vehicle so that passenger tax can be collected from such person and State carriage is so used or caused or allowed to be

used. It is not feasible to collect passenger tax in respect of number of seats which are vacant in omnibuses when exclusively used or kept for use as contract carriages. It is considered necessary to levy additional motor vehicle tax on such omnibuses at monthly, weekly and daily rate subject to a maximum of Rs. 240/-, 80/- and 16/- respectively per passenger permitted to be carried in ordinary omnibuses and Rs. 380/-, 120/- and 24/- respectively per passenger permitted to be carried in luxury or tourist omnibuses.

20. During the course of hearing, learned Counsel Mr. Gohil produced a copy of the Bill seeking amendment to Bombay Motor Vehicles (Taxation of Passengers) (Gujarat Amendment) Act, 1982 moved by the Minister in Legislative Assembly wherein also, a composite tax was proposed. The learned Advocate General contended that in view of the decision of the apex Court in P.V.Narsimha Rao Vs. State of AP, 1998 SC 2120, speeches of Members of Legislature are irrelevant. Evenif we ignore the speeches of Member of Legislative Assembly, during the course of presentation of bill, since the bill itself was presented by Hon'ble Minister, we holdthat it is relevant.

21. Even during the course of hearing, the Secretary of the 1st petitioner's Association of Special Civil Application No. 1288 of 2001 filed further affidavit refuting the stand taken by the State Government and maintained that in 1991, motor vehicles tax and additional tax was consolidated and was termed as composite tax. It is further stated that since 1991, several circulars and orders were issued by the State Government wherein it was termed as composite tax. Even the receipt for payment of tax also stated to be composite tax and in the audit note, it was treated to be composite tax. The deponent has produced various circulars along with affidavit in order to show that the tax was always treated to be a composite tax in view of above circumstances. We,therefore, hold that the tax was composite tax and not on passengers.

22. The learned Advocate General alternatively submitted that even if the present tax is treated as composite tax, it is still a tax on motor vehicles. It is not the name of the tax, but its real nature, its pith and substance, which must determine in which of the category it falls. He cited the decisions in the case of Union of India Vs. Bombay Tyre International Ltd., AIR 1984 SC 420 and Municipal Council, Kota, Rajasthan Vs. Delhi Cloth and General Mills Ltd., 2001 JT (3) SC 275.

23. The question that arises for our consideration is whether the State can demand advance of composite tax? Since section 3A(2) also requires registered owner to pay advance tax, the next question that arises, namely, whether the State can demand monthly tax in advance where vehicle is not used or kept for use. Entry 56 and 57 of List II SEVENTH SCHEDULE to the Constitution reads as under:

"56. Tax on goods and passengers carried by road or on inland waterways.

57. Taxes on vehicles, whether mechanically propelled or not suitable for use on roads including tramcars subject to provisions of Entry 35 of List III."

24. Mere look at both the entries, makes it clear that neither of the entries 56 or 57 authorises the State to levy advance tax. The word used in Entry 56 "passengers carried" presupposes use of bus on road, its capacity to carry passengers and its roadworthy condition. There is a difference between 'passengers carried' and 'capable of carrying passengers'. Carrying passengers depends on the use of bus and its roadworthy condition and availability of passengers while the capability of carrying passengers depends upon the seating capacity of the bus whether used or not used, whether it is in roadworthy condition or not etc. Thus, it is clear that demanding advance tax on passengers for one month is beyond the legislative Entry No.56.

25. Entry 57 which authorises tax on vehicle whether mechanically propelled or not, suitable for use on roads, presupposes its use on roads. In case of Bolani Ores Ltd. Vs. State of Orissa, AIR 1975 SC 17, the apex Court has observed as under:

"The validity of taxing power under Entry 57 of List II of Seventh Schedule read with Article 201 of the Constitution of India depends upon the regulatory and compensatory nature of taxes. It is not the purpose of the Taxation Act to levy taxes on vehicles which do not use the roads or in any way form part of flow of traffic on roads which is required to be regulated. The regulations under the Motor Vehicles Act for registration and prohibition of certain categories of vehicles being driven by persons who have no driving licence, even though those vehicles are not plying on the roads, are

designed to ensure safety of passengers and goods etc. for that purpose, it is enacted to keep control and check on the vehicles. Legislative power under Entry 35 of List III (Concurrent List)does not bar such a provision. But Entry 57 of List II is subject to the limitations that the power of taxation thereunder cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads viz. public roads. If the vehicles do not use the roads,notwithstanding the fact that they are registered under the Motor Vehicles Act, they cannot be taxed."

The apex Court had an occasion to interpret "kept for use on road" in the case of State of Mysore Vs. Sundaram Motors P.Ltd. AIR 1980 SC 148. In para 8 of the judgment, it is observed as under:

"The word "kept" has not been defined in the Tax Act. We have, therefore, to interpret it in its ordinary popular sense, consistently with the context. The word 'kept' has been repeatedly used in the section. In subsection (1), it occurs in association with the phrase 'for use on roads'. In that context, the ordinary dictionary meaning of the word 'kept' is 'to retain', 'to maintain', or cause 'to stay' or 'remain in a place', 'to detain', 'to stay or continue in a specified condition, position etc.' In association with the use of the vehicle, therefore, the workd 'kept' has an element of stationariness. It is something different from a mere state of transit or a course of journey through the State. It is something more than a mere stoppage or halt for rest, food or refreshment etc. in the course of transit through the territory of the State. "

Similarly, the Supreme Court in the case of Automobile Transport Ltd. Vs. State of Rajasthan, AIR 1962 SC 1406, interpreted words 'suitable for use on roads' construed in Entry 57 as under:

"The words 'suitable for use on roads' describe the kind of vehicles and not their condition. They exclude from the entry form, machinery, aeroplane, railways etc. whether mechanically propelled or not"

The meaning given by the apex Court to the words

'suitable for use on roads' would clear all doubts about the vehicle except machinery, aeroplane, railways etc. whether mechanically propelled or not, are suitable for use on roads which includes all motor vehicles owned and possessed by a person.

26. The question then arises for our consideration is whether the advance tax can be levied on the operators of vehicles who have filed Form NT declaring nonuse of the vehicle in question. In other words, can the tax be imposed on the vehicles which are not put on road or kept away from use.

27. In the case of Travancore Tea Co.Ltd. Vs. State of Kerala and ors., AIR 1980 SC 1547,the Supreme Court considered the question posed above and in para 6, observed that:

"If the words 'used or kept for use in the State' are construed as used or kept for use on the public roads of the State, the Act would be in conformity with the powers conferred on the State legislature under Entry 57 of List II. If the vehicles are suitable for use on public roads, they are liable to be taxed. In order to levy a tax on vehicles used or kept for use on public roads of the State and at the same time to avoid evasion of tax the legislature has prescribed the procedure. Subsection (2) of section 3 provides that the registered owner or any person having possession of or control of a motor vehicle of which a certificate of registration is current shall for the purpose of this Act be deemed to use or kept such vehicles for use in the State except during any period for which the Regional Transport Authority has certified in the prescribed manner that the motor vehicle has not been used or kept for use. Under this subsection, there is a presumption that a motor vehicle for which the certificate of registration is current shall be deemed to be used or kept for use in the State. This provision safeguards the revenue of the State by relieving it from the burden of proving that the vehicle was used or kept for use on the public roads of the State. At the same time, the interest of the bona fide owner is safeguarded by enabling him to claim and obtain a certificate of nonuser from the prescribed authority. In order to enable the owner of the vehicle or the person who is in possession or being in control of the motor

vehicle of which the certificate of registration is current to claim exemption from tax, he should get a certificate in the prescribed manner from the Regional Transport Officer."

28. The same view is taken by the Division Bench of this Court in the case of Kaushikbhai K.Patel Vs. State, 1998(2) GLR 1093. In the said case, this Court was required to consider the question whether refund of tax remitted in relation to omnibuses can be claimed on account of nonuser of the vehicle if the period of nonuse exceeds three months even in absence of proof of reasons beyond control of the person in possession or control. It was contended in the said case that omnibuses like any other class of vehicles are not liable to pay tax for the period during which they were not used or put to use on road for the whole period. This Court, after considering various rulings of the apex Court, held that :

"Nonuser of the vehicle alone is sufficient to the owner or person in possession to claim refund of tax for the period during which the vehicle was not put to use. If during that period, on verification, it is found that the vehicle has been used on public road, the State has the right to refuse the claim of refund. In a case where the nonuser of the vehicle is found by the Authorities of the Motor Vehicles Department, the owner is entitled to get refund of the tax for that period whether the nonuser was beyond his control or otherwise.

xxxxx

It is the nonuser that is the crucial fact that entitles the registered owner or the person in possession to get refund. The reason for nonuser is irrelevant. The scheme of motor vehicles taxation is that the tax has to be paid at a prescribed rate in advance. The liability to pay tax continues as long as the certificate of registration is current. If the vehicle had not actually been put to use for any period not being less than one calendar month, the person paying tax, should apply to the prescribed authority for getting refund of the tax after satisfying the authority about the nonuser and the truth of the claim for refund. Whenever the person paying the tax has not made use of the roads by plying the vehicle and substantiates his claim by proper proof, he is entitled to get refund of the tax in respect of that period of nonuser. Person who

paid the tax in advance in relation to an omnibus in the light of the provisions contained in the Constitution and in view of the pronouncement made by the Supreme Court is entitled to get refund of the tax for the period during which the vehicle was not put on road. He need not show that the nonuser was on account of reasons beyond his control. The insistence on proof of reasons beyond the control of the registered owner or the person in possession is beyond the Legislative competence of the State. "

The State carried the said matter before the apex Court. The apex Court dismissed the appeal by judgment rendered in the case of State of Gujarat Vs. Kaushikbhai K.Patel, AIR 2000 SC 2175 and upheld the decision of the Division Bench of this Court. This necessitated the State Government to come out with a notification dated 6.2.2001 impugned in the petition demanding advance tax irrespective of the fact of use or nonuse of the vehicle.

29. The learned Counsel for the petitioners described the said act of the State being in colourable exercise of powers. The learned Advocate General, however, contended that advance tax is always permissible. In the submission of learned Advocate General, when the section itself permits levying advance tax and when there is a provision of refund in the statute, the grievance of the petitioners is not tenable. Our attention is invited by the learned Advocate General to the decision in the case of State of Karnataka Vs.K.Gopalakrishna Shenoy anr., AIR 1987 SC 1911. In the said decision, the apex Court was required to consider section 3(1), Explanation 7, 4 of the Karnataka Motor Vehicles Act as well as Rules 20 and 23 of Karnataka Motor Vehicles Taxation Rules. It was observed that:

"Section 3(1) confers a right upon the State to levy a tax on all motor vehicles which are suitably designed for use on roads at prescribed rates without reference to the roadworthy condition of the vehicle or otherwise. S.4 enjoins every registered owner or person having possession or control of the motor vehicle to pay the tax in advance. The Explanation to S.3(1) contains a deeming provision and its effect is that as long as the Certificate of Registration of a motor vehicle is current, it must be deemed to be a vehicle suitable for use on the roads. The inevitable consequence of the Explanation would be that the owner or a person having

control or possession of a motor vehicle is statutorily obgliged to pay the tax in advance for the motor vehicle as long as the Certificate of Registration is current irrespective of the condition of the vehicle for use on the roads and irrespective of whether the vehicle had a Certificate of Fitness with concurrent validity or not. The Act, however, takes care to see that the owner of a motor vehicle or a person having possession or control of it is not penalised by payment of tax in advance for a vehicle which had not been actually used during the whole of a period or part of a period for which tax had been paid by him. In this connection, it cannot be said that the impact of S.38 of the M.V.Act on S.22 of the said Act will have its ramifications on S.3(1) and the Explanation of the Taxation Act."

In our opinion, the said judgment is distinguishable. The apex Court also observed that:

"Even if vehicle was not in a roadworthy condition and could not be put to use on roads without the necessary repairs being carried out, the owner or person having possession or control of a vehicle is enjoined to pay the tax on the vehicle and then seek a refund. Perhaps in exceptional cases where the vehicle has met with a major accident or where it is in need of such extensive repairs that it would be impossible to put the vehicle to use or where the Transport Authorities themselves prohibit the use of the vehicle due to its defective condition and cancel the Certificate of Fitness or suspend it, the person may surrender the Certificate Registration and other documents like permit etc., and seek the permission of the Transport Authorities to waive the payment of tax on the ground that no proof of nonuser was necessary and as such payment of tax on the one hand and an automatic application for refund on the other would be a needless ritualistic formality and if the permission sought for is granted, he need not pay the tax."

The aforesaid exceptional circumstances referred to by the apex Court, it appears,do not form part of Rules in the State of Karnataka as they are not mentioned in the judgment. Even assuming that those exceptional circumstances are there in the Rules, as observed by the

apex Court,exemption can be claimed by the owner or the occupier of the vehicle. As far as the State of Gujarat is concerned, before amendment of Rule 5, the owner or occupier of omnibus was not required to pay the advance tax for the nonuse of the vehicle as he was required to file Form 'NT' and was required to surrender registration certificate, fitness certificate etc. for the period of nonuse. As per the provisions of the rules, if the vehicles are clandestinely put to use, it is open for the authorities to take action against the owners in accordance with law. The Supreme Court in Kaushikbhai's case (supra) clearly observed that:

> "Mere apprehension of clandestine use of a vehicle cannot be a ground for imposing tax on omnibuses which are not put on road or kept away from use. In Form NT, a declaration is made as to the place where the vehicle is kept for nonuse and further declaration is made that the owner shall not remove the said vehicle from the said place without the previous permission of the taxation authority. In the said Form, it is also stated that the certificate of taxation in respect of the said vehicle is also surrendered. Motor Vehicle Inspectors could also check and verify about the availability of the vehicle in place of 'nonuse'. Any clandestine operation or the absence of vehicle from the declared place of nonuse whenever and wherever detected attracts heavy penalty to the extent of 25% of the tax due and for repetition of such contraventions, the amount of penalty is coercively increased. Further claim for refund of tax for the period of nonuse of vehicle is allowed only if the owner or any person having possession or control of a designated omnibus proves to the satisfaction of the taxation authority that the bus in respect of which the tax has been paid has not been used or kept for use for a particular period. If the authorities are not satisfied as to the nonuse of vehicle it is open to them to deny claim for refund. There is sufficient authority and machinery to the appellants to prevent evasion of tax in this regard. "

It is, therefore, clear that such provisions to protect the evasion of tax are not there in Karnataka Rules. In view of this, the apex Court was required to lay down law in K.Gopakakrishna's case (supra) in light of the facts and circumstances of that case. Further, the said decision refers to taxation and as stated above, the

scheme of the act is not as per the scheme of Gujarat Act. The facts are different. In any case, later judgment of the Supreme Court in Kaushikbhai Patel's case (supra) which deals with the scheme of Gujarat Act is applicable in the facts of the present case. We are, therefore, clearly of the opinion that the amendment to Rule 5 by providing payment of advance tax irrespective of the fact of nonuse of the vehicle wipes out the earlier provisions and decision of the Supreme Court in Kaushikbhai's case (supra). The apex Court, in the said decision, was constrained to observe that:

> "Looking to the Statement of Objects and Reasons for amendment, it appears that the appellants do not trust the owners of omnibuses or their own officers and machinery. Mere apprehension of the appellants that omnibuses will be clandestinely operated and claim would be made for refund on the ground of their nonuse, in our opinion, cannot justify for the insistence of satisfaction as to the reasons beyond the control of the owner or person for nonuse of a omnibus. There is no good reason put forward as to why the omnibuses are singled out. Even heavy goods transport vehicles are also purchased by investing heavy amount."

30. In our considered opinion, insistence on advance tax and insertion in Rule 5 is without the authority of law. True, the apex Court in AIR 1962 SC 1406 in the case of Automobile Transport (supra), has given meaning to the words 'suitable for use on roads' describing the kinds of vehicles and not their condition. While respectfully agreeing with the said decision, we may observe that a broad meaning is required to be given to the words 'suitable for use on roads'. The vehicles not registered, not carrying registration book, having no fitness certificate or not carrying permit, are the vehicles 'not suitable for use on roads' or the cases where the operators surrender all documents for non use before the authority are some of the examples for describing the vehicles 'not suitable for use on roads'. Section 39 of the Motor Vehicles Act deals with necessity of registration and prohibits anybody to drive motor vehicle unless the vehicle is registered. Section 56 of the Act requires Certificate of Fitness of transport vehicles. Once these documents are surrendered, it cannot be presumed that the vehicle is used or kept for use and, therefore, the advance tax is leviable. We are, therefore, unable to agree with the submission of the learned Advocate General when he submitted that it is

competent for the State to levy vehicle tax if the vehicles are kept for use within State and liability to pay tax is attracted on omnibuses getting registration within State as it is kept for use by the owner. One cannot dispute liability to pay tax on vehicle plying on road. Here we are concerned about the liability of owner to pay not only tax but advance tax and that is on vehicle which is not used or kept for use. In this case, the Registration Certificate as well as the fitness certificate are surrendered along with nonuse application under Form NT. It is required to be noted that the owner of the vehicle is required to decide whether he wants to keep the vehicle in nonuse in the next month and for that, he has to produce NT form before end of the previous month i.e. if the owner of a vehicle decides to keep the vehicle in nonuse in month of August, he will have to file NT form along with fitness certificate and registration certificate on or before 31.7.2001. Therefore, there isno question of paying the advance tax for the month of August, as the intention is very clear by producing declaration along with fitness certificate and registration certificate and under the provisions of the Bombay Motor Vehicles Tax Act, the vehicle cannot be plied on road for want of registration and fitness certificate. Therefore, advance tax in respect of non use vehicle either for one month or for the entire period for which they decide to keep the vehicle nonuse, is illegal, arbitrary and beyond the legislative competence of the State Government and, therefore, it is bad.

31. In view of the above discussion, we are not impressed with the submission of the learned Advocate General when he alternatively contended that even if present tax is treated as composite tax, it is still a tax on motor vehicles. It was pointed out by him that it is not the name of the tax, but its real nature, its pith and substance which must determine in which category it falls. As far as the present case is concerned, the composite tax is much higher than motor vehicles tax and additional tax which is in lieu of passenger tax and though they may be called as motor vehicles tax by the State Government, it is in substance a tax on passengers also wherein Entry 56 and 57 are attracted. Even assuming that it is a tax on motor vehicles, the nature of tax does not call for any advance tax which is not only the motor vehicles tax, but it is a composite tax. The decision cited by the learned Advocate General in the case of Union of India Vs. Bombay Tyre International Ltd., AIR 1984 SC 420 is distinguishable on the ground that it was a case of central excise while in our case, it is a tax on a vehicle which is of a compensatory and

regulatory nature. Likewise, the case of Municipal Council, Kota, Rajasthan Vs. Delhi Cloth and General Mills Ltd., 2000 JT (3) SC 275 was in respect of Rajasthan Municipalities Act where the StateGovernment was levying Dharmada tax and the same was challenged. In view of the legislative history, the said Dharmada tax was considered as octroi and the same was covered in entry. The facts of the case on hand are quite different and distinct and, therefore, the said ruling will not be of any assistance to the learned Advocate General.

32. Merely because refund is provided in the Act, that by itself is not a ground for rejecting the petitions when we are of the opinion that levy of advance tax itself is without the authority of law. We are supported in our view with the decision of the Supreme Court in the case of Bhawani Cotton Mills Ltd. Vs. State of Punjab & anr., 1967 STC 290. In Special Civil Application No. 13344 of 2000 in the matter of Larson & Toubro Ltd. Vs. Commissioner of Sales Tax, decided by us on 9.7.2001, the petitioner company challenged the constitutional validity of provisions contained in Chapter VA and particularly section 57B thereof on the sole ground of lack of legislative competence of the State legislature in enacting such a law authorising deductiion of sales tax at source on the total value of works contract payable to the contractor under the bills. Even though there was a provision, after following the decision of the Supreme Court in the case of Bhawani Cotton Mills Ltd. (supra), we held that collection of tax on inter State sales from the bills with a provision for its refund after assessment would not make the levy as valid and competent by the State legislature when the power to levy such tax vests exclusively with the Union in List I. We accordingly struck down provision contained in section 57B of the Sales Tax Act 1969 by holding it to be beyond legislative competence of the State legislature.

33. Learned Counsel for the petitioners contended that section 3A is violative of Article 14 being discriminatory inasmuch as it provided additional tax and then composite tax only to luxury buses having contract carriage permit while for stage carriage, the provision of section 3A is not made applicable. It was submitted that in respect of stage carriage used as contract carriage, the owner is not required to pay the tax on passenger basis i.e. on actual income basis. In the submission of learned Counsel, there is no reasonable classification and the classification has also no rationale so as to achieve the objective of the Act and,

therefore also, this provision is bad. Learned Counsel for the petitioners challenged the amendment of Rule 8 of the Rules as per notification dated 6.2.2001 by contending that under the previous Rule 8(iii) (a), relaxation of 20 days was given to the owners of transport vehicles from payment of tax, but under the amended rules, relaxation is taken away as far as only 10 days relaxation is given to the owners of transport vehicle. Consequently, a person has to pay advance tax every month on the last day of the month commencing from the next month. It was, therefore, contended that the said action is arbitrary and discriminatory.

34. In the case of G.K.Krishnan Vs. State of Tamil Nadu, AIR 1975 SC 583, it is laid down that the imposition of enhanced tax on contract carriages cannot be challenged as colourable exercise of powers nor is hit by Article 14. In para 29 of the said judgment, it is observed that the tax being compensatory in character, it can operate as an unreasonable restriction upon the fundamental right of the appellants to carry on their business, for, the very idea of compensatory tax is service more or less commensurate with the tax levied. It is further observed that the levy of enhanced tax on contract carriages was not hit by Article 14. In absence of any material placed before the Court, classification of vehicles as stage carriages and contract carriages for the purpose of imposing higher tax on the latter is presumed to be reasonable having regard to the fact that it was based upon local conditions of which the Government was fully cognizant. The differentiation, thus, made had a reasonable relation to the purpose of the Act.

The said view is reiterated in the case of Malwa Bus Service(Pvt.)Ltd. Vs.State of Punjab, AIR 1983 SC 634. In para 21 of the said judgment, it is observed that:

"xxxx even a fiscal legislation is subject to Article 14 of the Constitution. But it is well settled that a legislature in order to tax some need not tax all. It can adopt a reasonable classification of persons and things in imposing tax liabilities. A law of taxation cannot be termed as being discriminatory because different rates of taxation are prescribed in respect of different items provided it is impossible to hold that the said items belong to distinct and separate groups and that there is a reasonable nexus between the classification and the object

> to be achieved by the imposition of different rates of taxation. The mere fact that a tax falls more heavily on certain goods or persons may not result in its invalidity. As observed by this Court in Khandige Sham Bhat and Ors. v. The Agricultural Income Tax officer(1) in respect of taxation laws, the power of legislature to classify goods, things or persons are necessarily wide and flexible so as to enable it do adjust its system of taxation in all proper and reasonable ways. The courts lean more readily in favour of upholding the constitutionality of a taxing law in view of the complexities involved in the social and economic life of the community. It is one of the duties of a modern legislature to utilise the measures of taxation introduced by it for the purpose of achieving maximum social goods and one has to trust the wisdom of the legislature in this regard. Unless the fiscal law in question is manifestly discriminatory the Court should refrain from striking it down on the grounds of discrimination. These are some of the broad principles laid down by this Court in several of its decisions and it is unnecessary to burden this judgment with citations. Applying these principles it is seen that stage carriages which travel on an average about 260 kilometers every day on a specified route or routes with an almost assured quantum of traffic which invariably is over crowded belong to a class distinct and separate from public carriers which carry goods on undefined routes. Moreover the public carriers may not be operating every day in the State. There are also other economic considerations which distinguish stage carriages and public carriers from each other. The amount of wear and tear caused to the roads by any class of motor vehicles may not always be a determining factor in classifying motor vehicles for purposes of taxation."

In the case of State of Bihar Vs. Sachchidanand Kishore Prasad Sinha, AIR 1995 SC 885, the apex Court laid down that mere possibility of better classification is no ground to strike down the classification made by statutory authority more particularly in taxing enactment on the ground that the classification made by the rules is discriminatory and violative of Article 14of the Constitution of India.

35. In view of this settled position of law, it is

clear that the State Legislature is competent to pass the Act and disentitled to levy tax. If the authority has power to impose tax, it cannot be challenged on the ground that classification of vehicles as stage carriages, contract carriages for the purpose of higher levy of tax has no reasonable relation to the purpose of the Act.

36. Having gone through the Statements of Objects and Reasons of introduction of section 3A, namely it was considered necessary to augment the financial resources of the State to meet with the huge expenditure on account of natural calamities like scarcity, flood and cyclone, we are clearly of the view that the classification made between the stage carriages and contract carriages for the purpose of higher levy of vehicle tax is reasonable for the purposes of the Act and, therefore, we see no merits in the submission of the petitioners that section 3A(1) of the Act and Rule 8 of the Rules incorporated in notification dated 6.2.2001 is discriminatory and, therefore, violative of Article 14 of the Constitution of India. We, therefore, reject the contention on this point advanced by the petitioners.

37. The vehicle tax can be recovered in advance if the vehicle is used or kept for use as has been stated in section 3A(1). Section 3A(2) cannot be read in isolation and word 'advance' cannot be read in isolation, but it means it has connection with the use of the vehicle and, therefore, in case of non use, vehicle wherethe intention was shown by producing certificate and filing declaration in advance, no tax can be levied in advance as submitted by the State Government.

38. In view of this discussion, in our opinion, sections 3A (1)and (2) and amendment to Rule 5(1) and (2) are violative of Article 19(1)(g) inasmuch as the contract carriage, bus operators are singled out and asked to pay amount of composite tax on yearly basis on passengers permitted to be carried, even if the passengers are not travelled or even if the bus is not used for the entire month or year. In our opinion, section 3A (1) is violative of Entry 56 and 57 of List II of Seventh Schedule to the Constitution. The fact that motor vehicles tax is of composite nature, it is not of compulsory nature. Since the vehicle is not used or kept for use or passengers are not carried in full capacity, no tax can be levied under Entry 56 or 57 of List II of Seventh Schedule to the Constitution. Likewise, section 3A(2) is also ultra vires the Constitution and bad in law and violative of Article 19(1)(g) of the Constitution of

India. This is in view of the fact that the State Government is entitled to take tax in advance even though the vehicle is used or kept for use for the entire month or part of the month. One can understand if the vehicle is used on daily basis as it is a contract carriage. For that day, tax is required to be paid in advance, but by no stretch of imagination, it can be construed that the days for which no contract is obtained by the bus operator or the bus is declared not to be used for the entire month or part of the month or for number of days, even then interpreting subsection (2), advance tax is required to be taken for the entire month. In our opinion, such an interpretation is contrary to the principle "no use, no tax". It is, therefore, violative of Entry 56 and 57 of List II of Seventh Schedule to the Constitution and, therefore, bad in law.

39. We have gone through various authorities cited by the learned Advocate General to support his submissions. The decisions cited are not applicable to the facts of the present case and are distinguishable.

In the case of Travancore Tea Co. Vs. State of Kerala, AIR 1980 SC 1547, the apex Court, after interpreting section 3A, 3(2), 5 and 6 of Kerala Motor Vehicles Taxation Act and more particularly the expression 'shall be levied on all motor vehicles used or kept for use in the State' observed that the words 'used or kept for use in the State' if construed as used or kept for use on public roads of State, Act would be in conformity with powers of State Legislature under Entry 57, List II of the Constitution of India. It was observed that tax is only exigible on vehicles used or kept for use on public roads. But to claim exemption from payment of tax, requirements of section 3(2) or section 5 or 6 have to be satisfied. However, the apex Court, in para 8 of the said judgment, observed that:

> "While we agree with the contentions of the learned counsel for the appellant that the tax is only exigible on vehicles used or kept for use on public roads, we must observe that in order to claim exemption from payment of tax, requirements of section 3(2) or sections 5 and 6 should be satisfied. Surrender of the registration certificate contemplated under section 5 is for making sure that the motor vehicle is not being put to any use and does not have the effect of annulling the certificate of registration. If the requirement contemplated under the Act is not satisfied, the registered ownerorperson in

possession or control of the vehicle would not be entitled to claim any exemption from payment of tax."

In our opinion, the abovesaid observations will certainly help the case of the petitioners.

In the case of State of Mysore andors. Vs. Sundaram Motors P.Ltd., AIR 1980 SC 148, the facts are different in respect of Mysore Motor Vehicles Taxation Act. In the said case, the vehicle was stopped for rest, food or refreshment. It was held that it is not kept for use in the State. There was no question of NT form to be filled with the Registration Certificate and Fitness Certificate.

In the case of M/s International Tourists Corporation Vs. State of Haryana, AIR 1981 SC 774, again the Supreme Court was concerned with the case where a motor vehicle merely passed through the State and, therefore, no taxable event occurred and, therefore, the tax could not be levied. In that bacground of the matter, the Supreme Court observed that "In these cases, the taxable event is'keeping for use and alternatively user within the State. Once the motor vehicle is used within the State, taxable event occurs and tax is attracted." Thus, as per the decision of the Supreme Court, the taxation event isonly for the purpose of use of the road within the State. However, once it is decided not to use the vehicle on road by filing NT form under the provisions of rules, by surrendering all the papers as stated above, there is no taxable event and tax is not attracted on vehicles.

So far as the decision in the case of Union of India Vs. Chowgule & Co., AIR 1992 SC 1376 is concerned, the same is with respect to definition of motor vehicle and Bolani's case (supra) was distinguished on the ground of definition of motor vehicles andnot on the ground of Entry 56 of List II of Seventh Schedule of the Constitution. The same is the argument with respect to the decision reported in the case of Union of India Vs. Chowgule & Co., AIR 1992 SC 1371 and Jagannath Area and ors. Vs.State of Orissa, 1996(8) JT 530.

As regards the decision reported in the case of Crane Owners Association Vs. Union of India, 42(2) GLR 1189, the same is in respect to the definition of motor vehicle as this is a matter of Crane Owners Association. There was no question of filing NT forms, surrendering certificate and showing intention not to use on road by filing every paper in advance.

So far as decision reported in the case of State of Kerala Vs. Arvind Ramakant Modawdakar, AIR 1999 SC 2970 is concerned, the same refers to Entry 56 and 57 and the facts are that there is classification for inter-State contract carriage. There was no question of filing NT form, surrendering certificate and showing the intention to use the vehicle.

As regards decision reported in the case of State of Maharashtra Vs. MadhukarB.Badiya, AIR 1988 SC 2062, it is in respect of levy of one time tax on motor cycle. However, the challenge to section was upheld on the basis of affidavits filed by the State Government and the facts of the particular case are different from the facts of the present case. The vehicle cannot be taxed if it is not used on road even though it is registered and, therefore, the provision of refund is immaterial. Even the provision of refund is not providedfor in Rule 5 and it is also not provided that within how much time, the refund will be paid even assuming that the refund is permissible. It is true that there cannot be a mathematical nicities for refund, but if a vehicle is not used for a period between 1 to 29 days and the same is duly informedby the owner, the tax cannot be levied. Even for a part of month, it is obligtatory on the part of the State Government to receive applications and non receiving the said application for part of month is also bad in that view of the matter.

In respect of decision reported in the case of Union of India Vs. Sanyasi Rao, 219 ITR 330, section 44(A)(c) and section 20(6)(c) are underchallenge, but they operate in different field. In that case, taxing event is bound to happen while in the present case, NT form and submission of papers is the evidence to show that there is no question of any taxing event which is going to happen.

40. The learned Advocate General submitted that in the earlier petition filed before this Court by the petitioners, the petitioners had prayed for setting aside the impugned notice demanding payment of composite tax and for declaration that section 3A(5) of the Bombay Motor vehicles Act, 1958 as amended by Bombay Motor Vehicles (Gujarat Amendment) Act, 1992 is ultra vires being violative of Articles 14 and 19(1)(g) of the Constitution of India. It is, therefore, contended that once the validity of tax is upheld by the highest Court, the same cannot be the subject matter on one or the other ground.

Reliance is placed on the decision of Division Bench of this Court in the case of Murtujakhan Joravarkhan Babi Vs. Municipal Corporation of Ahmedabad, 1975 GLR 806. This Court ruled that once the constitutional validity of the Act is considered by the highest court of the country and the Act was upheld, merely because new point was raised in a different colour, such challenge cannot be upheld.

There cannot be any dispute with regard to the principle laid down in the said decision. However, the facts of the present case are quite different.

As regards decision referred to in 39(2) GLR 1093 i.e. Kaushikbhai K.Patel's case (supra), this Court and the Supreme Court of India were not concerned with refund, but they were concerned with the word 'beyond the control of owner for nonuse'. Consequently, the old Rule 5 was in operation when both these decisions were rendered and in old Rule 5, there was no question of paying any advance tax in respectof month for which nonuse application is filed. Therefore, there was no question of advance tax to be paid in view of the oldRule 5 which was in operation and the Supreme Court did not decide the matter for the advance payment of tax. Rule 5 was amended after the Supreme Court judgment. The State Government has misread the judgment of this Court as well as the Supreme Court of India to the effect that the scheme of advance payment of tax is approved by the Supreme Court. Firstly, there was no scheme of advance tax before the Supreme Court of India and secondly Rule 5 existing at that time does not provide for any advance tax.

41. As regards amending Act 11 of 2000 is concerned, the same is contrary to the judgment of the Supreme Court of India as the period was reduced from three months to one month and same reasons are also stated in the Act. In view of the fact that the Supreme Court in Kaushikbhai's case (supra) has decided that the reasons for nonuse are immaterial, the amending Act 11 of 2000 is required to be quashed and set aside.

42. Ordinance No.3 of 2000 is also bad as refund can be granted for three months by Taxing Authority and for the period beyond three months, the other authority is required to grant the refund, but then in that case, even if it is held to be valid, the refund cannot be adjusted for a period of more than three months.

43. The foregoing discussion would lead us to the only conclusion that section 3A(1) and (2) of the Bombay Motor Vehicles Tax Act, 1958 and amendment of Rule 5 of Bombay Motor Vehicles Tax Rules, 1959 incorporated in the notification dated 6.2.2001 and subsequent circular dated 8.2.2001 are beyond legislative competence and, therefore, they are required to be struck down.

44. In the result, all these petitions are partly allowed. We issue a writ of certiorari and set aside section 3A(1) and (2) of the Bombay Motor Vehicles Tax Act, 1958 and Rule 5 of Bombay Motor Vehicles Tax Rules, 1959 incorporated in the Notification dated 6.2.2001 qua Rule 5 only declaring them as beyond the legislative competence and, therefore, illegal, bad and without authority of law. Hence, we strike down the said provisions. We, therefore, issue a writ of mandamus directing the respondents, their men, agent or servants not to implement the notification dated 6.2.2001 and to recover tax in pursuance thereto from the vehicles which are kept for nonuse. On the same reasoning, we also quash and set aside the Amendment Act No.11 of 2000 as well as Ordinance No. 3 of 2000. We also direct the respondents to grant refund of advance tax already recovered from the petitioners in pursuance of the Act, Rules, Amending Act No.11 of 2000, Ordinance No. 3 of 2000, impugned notification dated 6.2.2001 and/or subsequent circular dated 8.2.2001, within three months from the date of receipt of this judgment, after examining the case of nonuse of the vehicle, submitted by the petitioners.

Rule in all matters is accordingly made absolute with no order asto costs.

(D.M.Dharmadhikari,CJ)

(K.R.Vyas,J.)

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

#. I have perused in the opinion of the Learned Brother Justice K.R.Vyas, the detailed discussion on various legal questions involved in the petitions and I concur with the same. However, I would like to add, in support of the conclusions reached by him, my own views on certain legal points which were highlighted by learned Advocate General supporting the impugned Legislation.

#. On behalf of the petitioners, it was argued that by

the impugned Amendment introduced to the Bombay Motor Vehicles Act, 1958, composite tax has been sought to be levied only on Omnibuses. By composite tax is meant, tax both on the vehicle and passengers carried in the vehicle. To demonstrate that the Legislature by the impugned legislation, intends to tax both, the vehicle and the passengers, reference was made to the Affidavit submitted by Shri Kanubhai M. Makwana on behalf of the State and the speeches of the Legislators on the Floor of the Assembly during debate on the Bill which ultimately resulted in passing of the impugned Amendment Act and framing of the Rules.

#. Learned Advocate General for the State in reply mainly contended that subject of tax is not to be determined from the measure of levy. The quantum of tax is based on seating capacity of the Omnibus, but that does not determine the essential character of tax or the competence of the Legislature. It is submitted that the nature of tax has not to be determined on the basis of label given to the imposition as `composite tax'. The argument is that the essential character of tax has to be determined on the basis of competence of the State Legislature referable to one or the other legislative Entries. It is submitted that the consequence and effect of Legislation are different from the subject matter of the Legislation. It is submitted that the nature and character of the Legislation and not its ultimate economic result that matters. Reliance is placed in this respect on the following decisions:

(i) M/s.Sainik Motors & ors. v. State of Rajasthan - AIR 1961 SC 1480.

(ii) Union of India & ors. v. Bombay Tyre International Ltd. & ors. - AIR 1984 SC 420.

(iii) Goodricke Group Ltd. & ors. v. State of West Bengal - JT 1994(7) SC 577

(iv) M/s.Shaktikumar M. Sancheti & anr. v. State of Maharashtra - JT 1994(7) 718.

#. It is not disputed that the State Legislature in its wisdom has done away the levy of passenger tax under the Act and revenue loss caused thereby is sought to be made good by imposing additional tax on Omnibuses. Schedule I-4 under Section 3A of the Act clearly shows that the measure of tax is seating capacity of the vehicle and not the actual number of passengers carried in it.

#. It is well settled that some external aid can be taken to construe a Legislation. The speech of the concerned Minister on the Floor of the Assembly and the Affidavits submitted on behalf of the State can be taken as external aids for determining the nature of the Legislation. We have no manner of doubt from overwhelming material produced before us that on abolition of passenger tax on Omnibuses, the revenue loss has been made good by increasing the tax on vehicles with its quantum based on seating capacity of the vehicles as prescribed in the impugned provisions of the Act and Rules. It is true, as contended on behalf of the State, that measure of tax is not determinative of the nature of the Legislation. The legislative competence of the State to impose tax on passengers carried by road under Entry 56 and tax on vehicles suitable for use on roads under Entry 57, 7th Schedule of the Constitution, cannot be questioned. It is competent for the State Legislature to have two separate Legislations referable to Entries 56 & 57 like Passenger Tax Act and Motor Vehicles Tax Act. It can also bring one common Legislation referable to both Entries 56 & 57 and such combined Legislation referable to two Entries cannot also be questioned on legislative competence.

#. To us, from the external aid that we derive from the speeches of the Legislators on the Floor of the House and the stand taken in the Affidavit on behalf of the State, the impugned Amendment and the Rules in relation to Omnibuses is a combined Legislation for imposing a composite tax referable to both Entries, 56 & 57 of List-II of the 7th Schedule of the Constitution. We have merely to judge whether the imposition of such a tax, composite or otherwise, is competent under any of the two Legislative Entries, that is 56 & 57. Under Entry 56, tax can be imposed on passengers carried by road. The Entry being for providing source of legislation, has to be construed widely. It includes ancillary and subsidiary power to prevent evasion of tax on passengers carried by road. The measure of tax in the impugned schedule is on the seating capacity of the Omnibuses. The attempt therefore clearly is to impose tax even if actually no passengers are carried in the vehicle. The argument advanced is that even though the vehicles are kept for non-use, they can be clandestinely used and it is not possible with limited staff and resources of the State to keep constant vigil on use of every Omnibus which runs on contract basis with usually no fixed advance tour programme. Assuming that such ancillary power under Entry 56 to prevent evasion of passenger tax is available to the State, such power cannot be exercised

by Legislation which provides that although Omnibus owner has filled necessary N.T. Form for non-use, surrendered all papers of the vehicle and intimated the authorities the place where the vehicle is kept during non-use period, the State Government would be competent to collect tax only on the basis of seating capacity of the vehicle and on proof of actual non-user, subsequently, refund or tax can be claimed. Where the tax cannot be imposed, provision made for its subsequent refund would not make levy valid and within competence. See following observations of Hon'ble Supreme Court in the case of Bhavani Cotton Mills Ltd. v. State of Punjab reported in AIR 1967 SC 1616 which we have relied in striking down similar provisions in Sales Tax Act in the case of Larsen & Toubro Limited in Special Civil Application No.13344 of 2000 decided on 18-7-2001:

> "If a person is not liable for payment of tax at all at any time the collection of a tax from him with a possible contingency of refund at a later stage will not make the original levy valid; because if the sales or purchases are exempt from taxation altogether they can never be taken into account at any stage for the purpose of calculating or arriving at the taxable turnover and for levying tax."

#. There can be no quarrel with the proposition based on various decisions of the Hon'ble Supreme Court cited that nature of tax and measure of its levy are two different aspects. Tax on vehicles can be collected on the basis of the weight of the vehicle, its size or on seating capacity of the vehicle. I agree with Learned Brother Justice K.R.Vyas for the view he has expressed in his opinion that under Entry 57, tax based on seating capacity of the vehicle cannot be collected in advance when the vehicle is formally, in accordance with the procedure prescribed, is kept for non-use. Under Entry 57, tax can be imposed on vehicles, "suitable for use on roads". The vehicles for which there is a formal declaration of intended non-use in the prescribed form with surrender of all documents of vehicle and intimation of its being kept in non-use, tax in advance cannot be collected with a promise of subsequent refund on apprehension that even during the period the vehicle is kept for non-use, clandestine use may be made and the Department has no adequate staff and infrastructure to check such clandestine use of vehicle. The ancillary and subsidiary power of taxation to make provision to prevent evasion of tax cannot be extended to such a limit of permitting imposition of tax when there is no taxable

event or basis. Learned Brother Justice K.R.Vyas in his opinion took note of the fact that tax collected on vehicle during the period of its non-use is not fully refunded. The tax collected for less than a month would in any case be retained by the State despite proof of non-use of the vehicle by treating it to be an establishment charge or some other expenses or on the ground that it is practically not possible to refund every smallest part of the tax. Such attempt made by impugned provision is clearly beyond legislative competence of the State, both under Entry 56 and Entry 57. The observations of the Hon'ble Supreme Court in the case of Bhavani Cotton Mills Ltd. v. State of Punjab (supra), fully support the view that we have taken.

#. Merely because tax not imposable but collected in advance can be refunded, would not make the initial levy valid and within legislative competence. We are clearly of the opinion that the impugned provisions enabling imposition of tax in advance on vehicle not intended to be used or kept for use and enacted merely to prevent likely evasion of tax is beyond legislative competence of the State, both under Entry 56 & 57 of the Constitution. The impugned provisions, Rules and the Schedule thereunder deserve to be quashed.

#. For the additional reasons given by me above, I agree with the reasoning and conclusions arrived by my Learned Brother Justice K.R.Vyas, in his detailed opinion for allowing the petitions and in granting reliefs mentioned therein.

(D.M.Dharmadhikari, C.J.)

After pronouncement of our order, learned Advocate General requested that operation of this order may be stayed for four weeks to enable the State to approach higher forum.

Request of the learned Advocate General is granted with direction that operation of our order shall remain in abeyance for four weeks. Interim relief which was operative during the pendency of these petitions shall continue for a further period of four weeks.

(D.M.Dharmadhikari,C.J.)

(K.R.Vyas,J.)

sonar/-